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CLERK OF DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY np DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CHARLES E. MOSES, Jr.,
CDCR #K-65174,

Plaintiff,

vs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
CALIFORNIA, et al.,

Defendants.

Civil No. 15-cv-01793 BEN (RBB)

ORDER:

**(1) DENYING MOTIONS TO
PROCEED IN FORMA
PAUPERIS AND TO APPOINT
COUNSEL AS BARRED BY
28 U.S.C. § 1915(g)
[ECF Doc. Nos. 2, 3]**

AND

**(2) DISMISSING CIVIL ACTION
WITHOUT PREJUDICE FOR
FAILURE TO PAY FILING
FEE REQUIRED BY
28 U.S.C. § 1914(a)**

Plaintiff Charles E. Moses, Jr., currently incarcerated at California Medical Facility in Vacaville, California, and proceeding pro, has filed a civil rights complaint pursuant to 42 U.S.C. § 1983. (Doc. No. 1.) Plaintiff claims the U.S. District Court for the Southern District of California violated his right to due process by denying his motion to appoint counsel and dismissing his writ of habeas corpus pursuant to 28 U.S.C. § 2254 in *Moses v. Beard*, No. 12-cv-1003-MMA (JMA) (S.D. Cal. May 21, 2014). (Compl. at 2-3, Exs. A-C.)

1 Plaintiff has not prepaid the full civil filing fee required by 28 U.S.C.
 2 § 1914(a); instead, he has filed a Motion to Proceed In Forma Pauperis (“IFP”) (Doc.
 3 No. 2), as well as a Motion for Appointment of Counsel (Doc. No. 3).

4 I.

5 MOTION TO PROCEED IFP

6 “All persons, not just prisoners, may seek IFP status.” *Moore v. Maricopa*
 7 *Cnty. Sheriff’s Office*, 657 F.3d 890, 892 (9th Cir. 2011). Prisoners like Plaintiff,
 8 however, “face an additional hurdle.” *Id.* In addition to requiring prisoners to “pay
 9 the full amount of a filing fee,” in “increments” as provided by 28 U.S.C.
 10 § 1915(a)(3)(b), *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), the Prison
 11 Litigation Reform Act (“PLRA”) amended section 1915 to preclude the privilege to
 12 proceed IFP:

13 . . . if [a] prisoner has, on 3 or more prior occasions, while
 14 incarcerated or detained in any facility, brought an action or
 15 appeal in a court of the United States that was dismissed on
 16 the grounds that it is frivolous, malicious, or fails to state a
 claim upon which relief can be granted, unless the prisoner is
 under imminent danger of serious physical injury.

17 28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’
 18 provision.” *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005).

19 “Pursuant to § 1915(g), a prisoner with three strikes or more cannot proceed
 20 IFP.” *Id.*; *see also Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (under
 21 the PLRA, “[p]risoners who have repeatedly brought unsuccessful suits may entirely
 22 be barred from IFP status under the three strikes rule.”). The objective of the PLRA
 23 is to further “the congressional goal of reducing frivolous prisoner litigation in
 24 federal court.” *Tierney v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997). “[S]ection
 25 1915(g)’s cap on prior dismissed claims applies to claims dismissed both before and
 26 after the statute’s effective date.” *Id.* at 1311.

27 “Strikes are prior cases or appeals, brought while the plaintiff was a prisoner,
 28 which were dismissed on the ground that they were frivolous, malicious, or failed to

1 state a claim,” *King*, 398 F.3d at 1116 n.1 (internal quotations omitted), “even if the
 2 district court styles such dismissal as a denial of the prisoner’s application to file the
 3 action without prepayment of the full filing fee.” *O’Neal v. Price*, 531 F.3d 1146,
 4 1153 (9th Cir. 2008). Once a prisoner has accumulated three strikes, he is prohibited
 5 by section 1915(g) from pursuing any other IFP action in federal court unless he can
 6 show he is facing “imminent danger of serious physical injury.” 28 U.S.C. § 1915(g);
 7 *see also Cervantes*, 493 F.3d at 1051-52 (noting § 1915(g)’s exception for IFP
 8 complaints which “make[] a plausible allegation that the prisoner faced ‘imminent
 9 danger of serious physical injury’ at the time of filing.”).

10 II.

11 APPLICATION TO PLAINTIFF

12 As an initial matter, the Court has carefully reviewed Plaintiff’s Complaint and
 13 has ascertained that it does not contain any “plausible allegations” to suggest he
 14 “faced ‘imminent danger of serious physical injury’ at the time of filing.” *Cervantes*,
 15 493 F.3d at 1055 (quoting 28 U.S.C. § 1915(g)).

16 A court “‘may take notice of proceedings in other courts, both within and
 17 without the federal judicial system, if those proceedings have a direct relation to
 18 matters at issue.’” *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (quoting
 19 *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002)); *see also United*
 20 *States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248
 21 (9th Cir. 1992).

22 Thus, this Court takes judicial notice that Plaintiff, Charles Moses, Jr., CDCR
 23 #K-65174, while incarcerated, has brought more than three prior civil actions and
 24 appeals in federal court which have been dismissed on the grounds that they were
 25 frivolous, malicious, or failed to state a claim upon which relief may be granted.

26 They are:

27 1) *Moses v. Krause*, Civil Case No. 3:11-cv-00169-MMA-PCL (S.D. Cal.
 28 March 18, 2011) (Order Dismissing First Amended Complaint for Failing to State a

1 Claim pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)) (Doc. No. 6) (strike
2 one);

3 2) *Moses v. White*, Civil Case No. 3:12-cv-0073-JLS-BGS (S.D. Cal. March
4 19, 2012) (Order Granting Motion to Proceed IFP and Dismissing Action pursuant to
5 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b)) (Doc. No. 5) (strike two);

6 3) *Moses v. Superior Court of San Diego*, Civil Case No. 3:12-cv-0937-
7 AJB-JMA (S.D. Cal. June 21, 2012) (Order Dismissing Civil Action as Frivolous
8 pursuant to 28 U.S.C. § 1915A(b)(1) and Denying Motion to Proceed IFP as Moot)
9 (Doc. No. 4) (strike three); and

10 4) *Moses v. White*, Civil Case No. 3:13-cv-02610-LAB-MDD (S.D. Cal.
11 Nov. 12, 2013) (Order Dismissing Civil Action as Frivolous pursuant to 28 U.S.C.
12 § 1915A(b)(1) and Denying Motion to Proceed IFP as Moot (Doc. No. 4); (Dec. 20,
13 2013 Order Denying Motion for Reconsideration) (Doc. No. 13); and (April 7, 2014
14 Mandate of the USCA Dismissing Appeal for Lack of Jurisdiction) (Doc. No. 19)
15 (strike four).

16 Accordingly, because Plaintiff has, while incarcerated, accumulated more than
17 the three strikes permitted pursuant to § 1915(g), and he fails to make a “plausible
18 allegation” that he faced imminent danger of serious physical injury at the time he
19 filed his Complaint, he is not entitled to the privilege of proceeding IFP in this action.
20 *See Rodriguez*, 169 F.3d at 1180 (finding that 28 U.S.C. § 1915(g) “does not prevent
21 all prisoners from accessing the courts; it only precludes prisoners with a history of
22 abusing the legal system from continuing to abuse it while enjoying IFP status”); *see*
23 *also Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984) (“[C]ourt permission to
24 proceed IFP is itself a matter of privilege and not right.”).

25 In addition, Plaintiff’s Motion to Appoint Counsel (Doc. No. 3) depends upon
26 his IFP status. *See* 28 U.S.C. § 1915(e)(1) (“The court may request an attorney to
27 represent any person unable to afford counsel.”). The decision to request counsel
28 pursuant to § 1915(e)(1) first requires that the plaintiff has been determined eligible

1 to proceed pursuant to the IFP statute due to his indigency, is within "the sound
2 discretion of the trial court[,] and is granted only in exceptional circumstances."
3 *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004). As Plaintiff
4 has not been afforded IFP status, he is not entitled to appointment of counsel.

5 **III.**

6 **CONCLUSION AND ORDER**

7 For the reasons set forth above, the Court hereby:

8 (1) **DENIES** Plaintiff's Motions to Proceed IFP and to Appoint Counsel
9 (Doc. Nos. 2, 3) as barred by 28 U.S.C. § 1915(g);


10 (2) **DISMISSES** this civil action *sua sponte* without prejudice for failing to
11 prepay the \$400 civil and administrative filing fees required by 28 U.S.C. § 1914(a);
12 and

13 (3) **CERTIFIES** that an IFP appeal from this Order would be frivolous and
14 therefore, not taken in good faith pursuant to 28 U.S.C. § 1915(a)(3). *See Gardner v.*
15 *Pogue*, 558 F.2d 548, 550 (9th Cir. 1977) (indigent appellant is permitted to proceed
16 IFP on appeal only if appeal would not be frivolous); *Coppedge v. United States*, 369
17 U.S. 438, 445 (1962).

18 The Clerk shall close the file.

19 **IT IS SO ORDERED.**

20
21 DATED: November 19, 2015

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23 HON. ROGER T. BENITEZ
24 United States District Judge
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